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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 TALLON HODGES,

11 Plaintiff,

12 v.

13 DEPARTMENT OF CORRECTIONS, et
14 al.,

Defendants.

No. C09-5624 FDB/KLS

ORDER TO AMEND OR SHOW CAUSE

15 This civil rights action has been referred to United States Magistrate Judge Karen L.
16 Strombom pursuant to 28 U.S.C. § 636(b)(1) and Local MJR 3 and 4. Plaintiff Tallon Hodges is
17 presently confined at the Washington Corrections Center in Shelton, Washington.

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19 Presently before this Court for review is Mr. Hodges's complaint in which he asserts
20 claims against the Department of Corrections (DOC), Washington Correction Center (WCC), Dr.
21 Kunkel and the Gig Harbor Medical Pavilion. Dkt. 1-2. Mr. Hodges alleges that he broke his
22 hand in June 2009 while in custody at WCC and that Dr. Kunkel performed surgery on his hand,
23 placing a pin in his bone to hold it together. *Id.* He alleges that on August 9, 2009, the pin fell
24 out. *Id.* His hand was x-rayed and he was told that his hand was still completely broken. *Id.*
25 Since that time, Mr. Hodge's claims that there has been no follow-up on his care by the medical
26 staff at WCC. *Id.*

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1 Mr. Hodges seeks damages for suffering and medical malpractice and medical
2 negligence. *Id.*, p. 4.

3 I. DISCUSSION

4 The Court “may act on its own initiative to note the inadequacy of a complaint and
5 dismiss it for failure to state a claim” upon which relief may be granted. *Wong v. Bell*, 642 F.2d
6 359, 361 (9th Cir. 1981) (citing 5 C. Wright & A. Miller, Federal Practice and Procedure, s 1357
7 at 593 (1969)); see also *Sparling v. Hoffman Construction Co. Inc.*, 864 F.2d 635, 638 (9th Cir.
8 1988); *Omar v. Sea-Land Service, Inc.*, 813 F.2d 986, 991 (9th Cir. 1987) (court may sua sponte
9 invoke Fed. R. Civ. P. 12(b)(6) to dismiss deficient complaint); *Crawford v. Bell*, 599 F.2d 890,
10 893 (9th Cir. 1979).

12 The Court must give a plaintiff both “notice of its intention to dismiss” and “some
13 opportunity to respond,” however, unless plaintiff “cannot possibly win relief.” *Sparling*, 864
14 F.2d at 638 (quoting *Wong*, 642 F.2d at 362)). Accordingly, while the Court finds that dismissal
15 of Mr. Hodges’s complaint under Fed. R. Civ. P. 12(b)(6) is proper for the reasons set forth
16 below, the Court is issuing this order to show cause in order to give Mr. Hodges an opportunity
17 to file a response or amend his complaint.

19 A complaint is legally frivolous when it lacks an arguable basis in law or fact. *Neitzke v.*
20 *Williams*, 490 U.S. 319, 325 (1989); *Franklin v. Murphy*, 745 F.2d 1221, 1227-28 (9th Cir.
21 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an
22 indisputably meritless legal theory or where the factual contentions are clearly baseless. *Neitzke*,
23 490 U.S. at 327. A complaint or portion thereof, will be dismissed for failure to state a claim
24 upon which relief may be granted if it appears the “[f]actual allegations . . . [fail to] raise a right
25 to relief above the speculative level, on the assumption that all the allegations in the complaint
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1 are true.” See *Bell Atlantic, Corp. v. Twombly*, 540 U.S. 544, 127 S.Ct. 1955, 1965
2 (2007)(citations omitted). In other words, failure to present enough facts to state a claim for
3 relief that is plausible on the face of the complaint will subject that complaint to dismissal. *Id.* at
4 1974.

5 The court must construe the pleading in the light most favorable to plaintiff and resolve
6 all doubts in plaintiff’s favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). Unless it is
7 absolutely clear that amendment would be futile, however, a pro se litigant must be given the
8 opportunity to amend his complaint to correct any deficiencies. *Noll v. Carlson*, 809 F.2d 1446,
9 1448 (9th Cir. 1987).

11 To state a claim under 42 U.S.C. § 1983, a complaint must allege that the conduct
12 complained of was committed by a person acting under color of state law and that the conduct
13 deprived a person of a right, privilege, or immunity secured by the Constitution or laws of the
14 United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), overruled on other grounds, *Daniels*
15 *v. Williams*, 474 U.S. 327 (1986). Section 1983 is the appropriate avenue to remedy an alleged
16 wrong only if both of these elements are present. *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th
17 Cir. 1985), cert. denied, 478 U.S. 1020 (1986).

19 Plaintiff also must allege facts showing how individually named defendants caused or
20 personally participated in causing the harm alleged in the complaint. *Arnold v. IBM*, 637 F.2d
21 1350, 1355 (9th Cir. 1981). A defendant cannot be held liable under 42 U.S.C. § 1983 solely on
22 the basis of supervisory responsibility or position. *Monell v. New York City Dept. of Social*
23 *Services*, 436 U.S. 658, 694 n. 58 (1978). A theory of respondeat superior is not sufficient to
24 state a section 1983 claim. *Padway v. Palches*, 665 F.2d 965, 968 (9th Cir. 1982).

1 To state a cause of action under § 1983, Mr. Hodges must allege that (1) the named
2 Defendants deprived him of a right secured by the Constitution or laws of the United States and
3 (2) that, in doing so, the Defendants acted under color of state law. See *Flagg Bros., Inc. v.*
4 *Brooks*, 436 U.S. 149, 156-57, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978). Mr. Hodges states that he
5 is suing the defendants for “medical malpractice and medical negligence.” Dkt. 1-2, p. 4.
6 However, “a complaint that a physician has been negligent in diagnosis or treating a medical
7 condition does not state a valid claim of medical mistreatment under the Eighth Amendment.
8 Medical malpractice does not become a constitutional violation merely because the victim is a
9 prisoner.” *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); see also *Lopez v. Smith*, 203 F.3d 1122,
10 1131 (9th Cir. 2000) (en banc); *Frost v. Agnos*, 152 F.3d 1124, 1130 (9th Cir. 1998) (9th Cir.
11 1998).

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13 To state a claim under the Eighth Amendment, Mr. Hodges must include factual
14 allegations that a state actor acted with deliberate indifference to his serious medical needs.
15 Deliberate indifference to an inmate’s serious medical needs violates the Eighth Amendment’s
16 proscription against cruel and unusual punishment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).
17 Deliberate indifference includes denial, delay or intentional interference with a prisoner’s
18 medical treatment. *Id.* at 104-5; see also *Broughton v. Cutter Labs.*, 622 F.2d 458, 459-60 (9th
19 Cir. 1980). To succeed on a deliberate indifference claim, an inmate must demonstrate that the
20 prison official had a sufficiently culpable state of mind. *Famer v. Brennan*, 511 U.S. 825, 836
21 (1994). A determination of deliberate indifference involves an examination of two elements: the
22 seriousness of the prisoner’s medical need and the nature of the defendant’s response to that
23 need. *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992).
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1 First, the alleged deprivation must be, objectively, “sufficiently serious.” *Farmer*, 511
2 U.S. at 834. A “serious medical need” exists if the failure to treat a prisoner’s condition would
3 result in further significant injury or the unnecessary and wanton infliction of pain contrary to
4 contemporary standards of decency. *Helling v. McKinney*, 509 U.S. 25, 32-35 (1993);
5 McGuckin, 974 F.2d at 1059. Second, the prison official must be deliberately indifferent to the
6 risk of harm to the inmate. *Farmer*, 511 U.S. at 834.

8 An official is deliberately indifferent to a serious medical need if the official “knows of
9 and disregards an excessive risk to inmate health or safety.” *Id.* at 837. Deliberate indifference
10 requires more culpability than ordinary lack of due care for a prisoner’s health. *Id.* at 835. In
11 assessing whether the official acted with deliberate indifference, a court’s inquiry must focus on
12 what the prison official actually perceived, not what the official should have known. See *Wallis*
13 *v. Baldwin*, 70 F.3d 1074, 1077 (9th Cir. 1995). In other words an official must (1) be actually
14 aware of facts from which an inference could be drawn that a substantial risk of harm exists, (2)
15 actually draw the inference, but (3) nevertheless disregard the risk to the inmate’s health.
16 *Farmer*, 511 U.S. at 837-8.

18 Mr. Hodges has failed to properly identify the individual defendants who have allegedly
19 caused him harm. Plaintiff names the Gig Harbor Medical Pavillion, Washington Correction
20 Center and Department of Corrections, but these entities are not proper parties. Mr. Hodges has
21 failed to include any allegations that the Gig Harbor Medical Pavilion and/or its employees
22 participated in or directed the violation or knew of and failed to prevent violation of any
23 constitutional right. *Monell*, 436 U.S. at 694; *Ybarra v. Reno Thunderbird Mobile Home Village*,
24 723 F.2d 675, 680-81 (9th Cir. 1984). In addition, entities such as the “DOC” and “WCC” are
25 not “persons” for purposes of a section 1983 civil rights action. Section 1983 authorizes
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1 assertion of a claim for relief against a “person” who acted under color of state law. A suable
2 §1983 “person” encompasses state and local officials sued in their personal capacities, municipal
3 entities, and municipal officials sued in an official capacity. See also, *Will v. Michigan*
4 *Department of State Police*, 491 U.S. 58 (1989). Mr. Hodges must set forth facts describing
5 when, where and how *individually* named defendants deprived him of a constitutional right.
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7 Finally, Mr. Hodges indicates on his complaint that there is a grievance procedure
8 available at his institution, that he has filed a grievance, but that the grievance process is not yet
9 complete. Dkt. 1-2, p. 2. By the Prison Litigation Reform Act of 1995 (PLRA), Congress
10 amended 42 U.S.C. § 1997e to provide that “[n]o action shall be brought with respect to prison
11 conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in
12 any jail, prison, or other correctional facility until such administrative remedies as are available
13 are exhausted.” 42 U.S.C. § 1997e(a). The exhaustion requirement “applies to all inmate suits
14 about prison life, whether they involve general circumstances or particular episodes, and whether
15 they allege excessive force or some other wrong.” *Porter v. Nussle*, 532 U.S. 516, 532 (2002).
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17 The Supreme Court has ruled that exhaustion of prison administrative procedures is
18 mandated regardless of the relief offered through such procedures. *Booth v. Churner*, 532 U.S.
19 731, 741 (2001). The Supreme Court has also cautioned against reading futility or other
20 exceptions into the statutory exhaustion requirement. *Id.* at 741 n.6. Moreover, because proper
21 exhaustion is necessary, a prisoner cannot satisfy the PLRA exhaustion requirement by filing an
22 untimely or otherwise procedurally defective administrative grievance or appeal. *Woodford v.*
23 *Ngo*, 548 U.S. 81, 92-93 (2006).
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1 Due to the deficiencies described above, the Court finds that dismissal of Mr. Hodges's
2 complaint is proper. However, Mr. Hodges will be given an opportunity to file an amended
3 complaint curing, if possible, the above noted deficiencies, or show cause explaining why this
4 matter should not be dismissed no later than **December 18, 2009**. Mr. Hodges's amended
5 complaint shall consist of a short and plain statement showing that he is entitled to relief. Mr.
6 Hodges shall allege with specificity the following:

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8 (1) the names of the persons who caused or personally participated in causing the
9 alleged deprivation of his constitutional rights;

10 (2) the dates on which the conduct of each Defendant allegedly took place; and

11 (3) the specific conduct or action Mr. Hodges alleges is unconstitutional.

12 Mr. Hodges shall set forth his factual allegations in separately numbered paragraphs. The
13 amended complaint shall operate as a complete substitute for (rather than a mere supplement to)
14 the present complaint. Mr. Hodges shall present his complaint on the form provided by the
15 Court. The amended complaint must be legibly rewritten or retyped in its entirety, it should be
16 an original and not a copy, it may not incorporate any part of the original complaint by reference,
17 and it must be clearly labeled the "First Amended Complaint" and must contain the same cause
18 number as this case.
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20 If Mr. Hodges decides to file an amended civil rights complaint in this action, he is
21 cautioned that if the amended complaint is not timely filed or if he fails to adequately address the
22 issues raised herein on or before **December 18, 2009**, the Court will recommend dismissal of
23 this action as frivolous pursuant to 28 U.S.C. § 1915 and the dismissal will count as a "strike"
24 under 28 U.S.C. § 1915(g). Pursuant to 28 U.S.C. § 1915(g), enacted April 26, 1996, a prisoner
25 who brings three or more civil actions or appeals which are dismissed on grounds they are
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1 legally frivolous, malicious, or fail to state a claim, will be precluded from bringing any other
2 civil action or appeal in forma pauperis “unless the prisoner is under imminent danger of serious
3 physical injury.” 28 U.S.C. § 1915(g).

4 **The Clerk is directed to send Mr. Hodges the appropriate form for filing a 42 U.S.C.**
5 **1983 civil rights complaint. The Clerk is further directed to send a copy of this Order and**
6 **a copy of the General Order to Plaintiff.**
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9 Dated this 23rd day of November, 2009.

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13 Karen L. Strombom
14 United States Magistrate Judge
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